IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RONNIE McATEE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 99 C 3170**
	)	
DWAYNE CLARK,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In 1996, petitioner Ronnie McAtee was tried and convicted of burglary in the Circuit Court of Cook County and was sentenced to ten years in prison. He has filed a petition for a writ of habeas corpus under 28 U.S.C. §2254. For the reasons stated below, the Court denies McAtee's petition.

Facts

McAtee was charged with robbery, specifically entering a railroad boxcar on January 8, 1996 with the intent to commit a theft. He was convicted after a bench trial held before Judge Thomas Davy. The sole witness in the prosecution's case in chief was Larry VanSoest, a security officer for CSX Railroad. He testified that on the morning of January 8, 1996, he inspected a train that was stopped waiting for a locomotive to come and saw no open cars. After the train started to move, VanSoest saw three people on a "tub" car (which has an open top) as the train passed over a viaduct. He observed that the door to one of the containers in the car was open and that one man was pulling merchandise

out and handing it to a second man who was on or near a ladder on the side of the container; the third man was on a cat walk over the top of the container. VanSoest returned to his car and drove further down the tracks; after a short distance, he got out of his car and walked to an embankment near the railroad tracks, where he saw a man jump off the railroad car and run down the embankment toward his car. He said this was one of the men he had previously seen on the railroad car and identified the man as McAtee. When McAtee saw VanSoest, he stopped, and VanSoest placed him under arrest. The other two men were not caught. VanSoest's partners later recovered boxes containing various merchandise of the type that had been in the container car. Over objection, the prosecutor was permitted to introduce a prisoner identification card that VanSoest said he had obtained from McAtee after his arrest. The prosecution rested following VanSoest's testimony.

McAtee's attorney introduced a stipulation regarding the testimony of a Dr. Huang, to the effect that in 1993, McAtee underwent surgery to his right knee following a gunshot wound that had the effect of fusing that knee. In rebuttal, the prosecution put VanSoest back on the stand; he stated that when he saw the defendant run after descending from the railroad car, "he was running in a straight leg like he jammed his knee or his leg where he was walking like hopping along with one leg like picking it up and throwing it in front."

In closing, McAtee's lawyer argued (albeit obliquely) that VanSoest did not have a good opportunity to view the offenders and that upon realizing that McAtee had a prisoner identification card, VanSoest had jumped to the conclusion that McAtee was one of the men he had seen. The trial judge, however, accepted VanSoest's testimony and found it sufficient to prove McAtee's guilt beyond a reasonable doubt.

After trial, McAtee moved for appointment of an attorney other than his public defender, arguing that the attorney had had little contact with him, had declined to file motions that McAtee had asked him to file, and was not acting in McAtee's best interest. The judge denied the motion.

McAtee was classified as a "Class X" offender based on the fact that he was over 21 and had two prior Class 2 felony convictions, *see* 730 ILCS 5/5-5-3(c)(8), making the sentencing range six to thirty years. The trial judge imposed a ten year sentence.

On appeal, the public defender's office moved to withdraw as McAtee's counsel pursuant to *Anders v. California,* 386 U.S. 738 (1967). The attorney assigned to the case submitted a memorandum discussing the issues that appeared in the record (sufficiency of the evidence and a possible challenge to the sentencing) and why she had determined they were without merit. McAtee filed a response to the motion in which he argued that he had been denied effective assistance of appellate counsel and that he had also been denied effective assistance of trial counsel because counsel had not filed a motion to suppress evidence and had failed to effectively impeach VanSoest. The Illinois Appellate Court granted the motion to withdraw and affirmed the conviction, directly addressing only the issue of sufficiency of the evidence. McAtee filed a *pro se* petition for leave to appeal to the Illinois Supreme Court, raising the same issues, but that court denied the petition.

McAtee then filed a *pro se* petition for post-conviction relief in which he argued that he had received ineffective assistance of both appellate and trial counsel (with regard to trial counsel, he focused mainly on the poor job he claimed counsel had done cross examining VanSoest and arguing the deficiency of his testimony); that VanSoest's testimony about his opportunity to see the offenders was perjured and the prosecution had known it; that the evidence was insufficient to convict; that the

prosecution had made an improper closing argument; and that the sentence was arbitrarily imposed. The trial court summarily dismissed the petition, concluding that several of the grounds had been argued or could have been argued on direct appeal, and that the remaining arguments were without merit. The Illinois Appellate Court affirmed the dismissal; McAtee did not petition for leave to appeal to the Illinois Supreme Court.

Discussion

1. Sufficiency of the evidence

The Court rejects McAtee's challenge to the sufficiency of the evidence. VanSoest testified that he had a good view of the offenders in broad daylight, said that he had arrested McAtee coming down an embankment from the train tracks where the train had been located, and unequivocally identified McAtee as one of the men that he had seen taking merchandise from the railroad car. VanSoest's testimony was not impeached in any significant way and was sufficient to establish the elements of burglary beyond a reasonable doubt.

2. Adequacy of trial counsel

Though McAtee's trial counsel was unable to impeach VanSoest's testimony to any great extent, that does not mean that he rendered constitutionally defective assistance as McAtee's attorney. Under *Strickland v. Washington*, 466 U.S. 668 (1984), McAtee must show both that his lawyer's performance fell below an objective standard of reasonableness, and that the trial was rendered fundamentally unfair or the result unreliable as a result of counsel's errors. *See also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). McAtee has failed to make this showing. Specifically, he has failed to point out to the Court (just as he failed to do in state court) anything that counsel could and

should have done at trial that would have undermined VanSoest's testimony. McAtee has pointed out some arguable inconsistencies in VanSoest's story, but they are minor at best and are far from sufficient to establish that McAtee suffered any prejudice from his counsel's allegedly insufficient efforts.

McAtee has not shown that his counsel was ineffective in failing to move to suppress VanSoest's identification. He says that the identification by VanSoest was unduly suggestive. But there is no indication that any sort of lineup or photo identification procedure was conducted; rather what McAtee seems to be saying is that the fact that VanSoest found a prisoner identification card on him tainted the identification. This was not a basis to suppress VanSoest's testimony; at most it provided the basis for an argument that his identification should not be given any weight. McAtee's counsel made precisely that argument to the court at trial.

McAtee has also failed to show that his counsel was deficient in presenting Dr. Huang's testimony by stipulation rather than in person. The critical element of Dr. Huang's testimony – that McAtee had a fused knee – was adequately presented to the trial judge in a way sufficient to suggest that McAtee could not have gotten in or out of the railroad car and would not have been able to run down the embankment. McAtee's counsel might have been better advised to inquire of VanSoest during the prosecution's case in chief whether he had noticed anything unusual about McAtee – if he had said no, Dr. Huang's testimony would have had greater impeachment value– but we have been given no reason to believe that VanSoest would have said anything different at that point than he ended up saying in his rebuttal testimony.

The remainder of McAtee's claims regarding his trial lawyer's allegedly ineffective assistance have been procedurally defaulted. A federal court ordinarily may not review a claim in a habeas corpus

petition unless the petitioner gave the state courts a full and fair opportunity to review the claim. *E.g.*, *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728, 1731 (1999). McAtee did not argue in his direct appeal that his counsel had failed to adequately investigate the case. He did not make this argument in his post-conviction petition either, and even if he had, he did not file a petition for leave to appeal to the Illinois Supreme Court after the dismissal of his post-conviction petition was affirmed on appeal. *O'Sullivan*, 119 S.Ct. at 1733-34 (failure to include claim in petition for leave to appeal to state's highest court constitutes procedural default). In addition, McAtee made no showing to the state courts regarding what his lawyer failed to do in investigating the case and how a better investigation would have helped McAtee's chances for an acquittal. He has made an attempt to do so in his habeas corpus petition, but because he failed to make these claims in state court, they are procedurally defaulted.

A petitioner's procedural default may be excused only if he can show cause for the default and actual prejudice as a result, or that the federal court's failure to consider the claim would result in a fundamental miscarriage of justice, namely the conviction of a person who is actually innocent of the crime. *See, e.g., Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Aliwoli v. Gilmore*, 127 F.3d 632, 634-35 (7th Cir. 1997). McAtee has failed to show any legally cognizable cause for his procedural default. His claim regarding the steps his lawyer should have taken to investigate the case before trial could not have been made in his direct appeal, because the basis the claim is not contained in the record of the trial (rather it consists of things that McAtee believes his lawyer would have discovered if he had tried). However, McAtee could have and should have made these points in his post-conviction petition. The only cause suggested by McAtee for his failure to do so is that he had a hard time

obtaining the transcript and common law record from his trial. However, the matters that McAtee claims his attorney could have learned if he had investigated further are not found in the transcript or the common law record, and thus the fact that McAtee may not have had access to those documents does not excuse his failure to raise these points in his post-conviction petition.

In short, McAtee has failed to show cause for the procedural default of his claim of ineffective assistance of counsel based on counsel's alleged failure to investigate the case prior to trial. For this reason, this Court is precluded from considering these claims.

3. Adequacy of assistance of appellate counsel

McAtee has also failed to show that he received constitutionally defective assistance of appellate counsel. Appellate counsel fully laid out for the Appellate Court the issues that appeared to present themselves from the record in the case. This Court has likewise reviewed that record in detail; McAtee's appellate counsel was correct in concluding that neither the issue of sufficiency of the evidence or the propriety of the sentence had any merit on appeal, and that no other issues appeared to present themselves from the record of McAtee's trial and sentencing.

4. Propriety of the sentence

McAtee raises no substantial federal constitutional issue regarding the ten year sentence that he received. The sentence was toward the low end of the six to thirty year range that applied as a result of McAtee's prior convictions. We see nothing in the record to suggest that the manner in which sentence was imposed, or the information that the trial judge considered, violated McAtee's due process or Eighth Amendment rights in any way.

5. Remaining claims

McAtee's remaining claims – that VanSoest perjured himself, that the trial judge prejudged his case, that trial counsel was laboring under a conflict after McAtee voiced his dissatisfaction, and the other issues addressed in his petition – are insubstantial and/or are unsupported by the record. There is no need to address these claims in detail.

Conclusion

For the foregoing reasons, the Court denies McAtee's petition for writ of habeas corpus. Judgment will enter in favor of respondent. On its own motion, the Court grants McAtee leave to proceed *in forma pauperis* on appeal, because McAtee appears to be unable to pay the appellate filing fee and can satisfy the criteria set forth in Fed. R. App. P. 24(a). However, the Court denies a certificate of appealability under 28 U.S.C. §2253(c)(2), as McAtee has made no substantial showing of the denial of a constitutional right.

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MATTHEW F. KENNELLY
United States District Judge

Date: January 26, 2001